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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-981

ALBERT PIERRO,

Petitioner,

—v.—

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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January 12, 1973

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No.

ALBERT PIERRO,

Petitioner,

—v.—

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Petitioner, ALBERT PIERRO, prays that a writ of certiorari issue to review the judgment and opinion entered on December 14, 1972 by the United States Court of Appeals for the Second Circuit in the proceeding entitled UNITED STATES OF AMERICA, Appellee, v. NICHOLAS CHRISTOPHE, et al., Defendants-Appellants.

Opinions Below

The opinion of the Court of Appeals, not yet reported, appears in the Appendix at page 1a.

Jurisdiction

The Judgment of the Court of Appeals was entered on December 14, 1972. The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).

Questions Presented

1. Whether the Circuit Court of Appeals erred in determining that federal agents had probable cause to conduct a warrantless search of an automobile suspected to contain evidence of an illegal narcotics transaction.

2. Whether probable cause to obtain and execute a search warrant for the Petitioner's residence was obtained as the result of another warrantless search which the Petitioner claims to have violated his Fourth Amendment rights.

Statutory Provisions

Title 21 USC, Section 841 states in part as follows:

> "§ 841 Prohibited acts A—Unlawful acts
>
> (a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—
>
> (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or
>
> (2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.
>
> PENALTIES
>
> (b) Except as otherwise provided in Section 845 of this Title, any person who violates subsection (a) of this section shall be sentenced as follows:
>
> (1) (a) In the case of a controlled substance in schedule I or II which is a narcotic drug, such

person shall be sentenced to a term of imprisonment of not more than 15 years, a fine of not more than $25,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 30 years, a fine of not more than $50,000, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such prior conviction, impose a special parole term of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole of at least six years in addition to such term of imprisonment."

Title 21 USC, Section 846 states as follows:

"§ 846. Attempt and conspiracy.

Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

Pub.L.9-513, Title II, § 406, Oct. 27, 1970, 84 Stat. 1265."

Statement of the Case

The Petitioner, Albert Pierro, was indicted along with three other named defendants in a two-count Indictment alleging a conspiracy and one substantive violation of the Federal Narcotics Law, Title 21, United States Code, Sections 812, 841(a)(1), 841(a)(1)(A) and 846. The facts which underlie the questions herein presented are those which were elicted at a pre-trial evidentiary hearing on the defendants' joint Motion to suppress evidence alleged to have been illegally seized.[1]

At that hearing, federal agents testified that surveillance of the Petitioner's residence in Palisades Park, New Jersey, was made on a tip that one Joseph Malizia, a fugitive under federal Indictment, had established contact with the Petitioner. (A 115-116)[2] The source of this tip was conceded by the Government to be unreliable. (A 296) On January 26, 1972, at approximately 10:15 P.M., the agents, from a vantage point some 50 yards south of the Pierro residence, observed the Petitioner leave his house with one Frank DeSimone,[3] who entered a vehicle and drove off at which time Pierro returned to the house. (A 60) Approximately 15 minutes after DeSimone left the area, a 1970 brown Cadillac appeared in front of the Petitioner's home and stopped. (A 62) Robert Harrington, a Federal Narcotics Agent, testified that he then saw a person appear in the second

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[1] The Petitioner, ALBERT PIERRO, was convicted by the Trial Court, sitting without a jury, on the facts developed at the suppression hearing.

[2] The letter "A" is used to introduce references to the Appellant's Appendix on file in the United States Court of Appeals for the Second Circuit.

[3] Frank DeSimone, indicted along with the Petitioner, was acquitted by the Trial Court, at the end of the Government's case.

floor window of the PIERRO residence and give some type of indication by a wave of the hand. (A 62) Immediately thereafter, the driver exited the vehicle and proceeded to the trunk portion. The Petitioner at the same time came out of his house and both individuals carried what was described as bundles or packages into the house. (A 63) One-half hour later, the Petitioner and the then unidentified driver left the house with a large blue valise and after "looking up and down the street", placed the valise into the Cadillac's trunk. (A 63) As the Petitioner returned to his home, the Cadillac drove off with the agents in pursuit.

The federal agents then followed the Cadillac to the Plaza Diner in Fort Lee, New Jersey, where the driver engaged two individuals in a conversation which could not be overheard. These others were the defendants DeSimone and Panica. (A 64-65) Shortly thereafter, the defendant DeSimone entered his vehicle and drove away while Panica and Christophe continued in the Cadillac. Following the Cadillac, the agents observed that vehicle in a course which led them to the George Washington Bridge, into New York and ultimately to the FDR Drive. Near the 116th Street exit of the FDR Drive, the agents placed a red light on the dashboard of their unmarked car, flashed their headlights and sounded their horn in an effort to stop the Cadillac. (A 67) There then began a high-speed chase of the defendants' vehicle through the streets of Manhattan. (A 67) Finally, the defendants brought their car to a sudden stop and proceeded to run in a continuing effort to avoid their pursuers. (A 67) Harrington testified that he shouted "Federal Agent, stop", but was unable to relate whether either defendant could hear him. The defendant Christophe was almost immediately apprehended by Harrington and a New York City patrolman, who had joined the chase, and

was taken back to the vehicle which he had abandoned. Moments later, the defendant Panica was confronted by federal agents in a local tavern at which time Panica falsely stated that he had been there for a substantial period of time. Returning to the vehicle with Panica, Harrington testified that the trunk of the Cadillac had been opened by brother agents and a large quantity of both narcotics and United States currency was discovered. (A 69)

Based upon this turn of events, agents returned to New Jersey and secured a search warrant for the Petitioner's premises, executing the warrant in the early morning hours of January 27, 1972. The agents there found approximately 39 pounds of heroin concealed in a cardboard box. (A 487-588)

Reasons for granting the Writ

The Circuit Court of Appeals has determined that the totality of circumstances here present sufficiently equalled the necessary probable cause to conduct the instant warrantless search of the Cadillac in issue. There can be no question that if the search of the Cadillac was founded on less than probable cause, the later search of the Petitioner's residence, executed pursuant to a judicially authorized warrant, is invalid as the now proverbial "fruit of the poisonous tree". *Wong Sun* v. *United States*, 371 U.S. 471 (1963); *Silverthorne Lumber Co.* v. *United States*, 251 U.S. 385 (1920). The question presented to this Court, therefore, is whether the warrantless search of the Cadillac automobile was in fact Constitutionally valid.

The events on which the Circuit Court of Appeals predicated its conclusion that the requisite probable cause did in fact exist can be reduced to the following:

The tip from an unidentified source

A "tip" which the agents received included the information that the Petitioner was a close friend of the fugitive Malizia and possibly a partner in the trafficking of narcotics. (A 240) The Government, through the Assistant United States Attorney, conceded that the source of the information was unreliable. (A 296)

Observations at the Pierro residence on January 26, 1972

On the evening of January 26, 1972, agents observed at the Pierro residence, the defendant Frank DeSimone, who they knew to be the brother of an individual who had been previously convicted of a federal narcotics offense. (A 69-70, 317) Also observed at that location was the defendant Christophe who, according to the agents, bore a physical resemblance to Joseph Malizia and who, prior to arrest, was thought by the agents to be Malizia. Additionally, the agents witnessed what appeared to be entirely innocent activity, i.e.: the transfer of packages from the Cadillac automobile to the house and the transfer of the blue valise from the house to the car. With regard to the Petitioner Pierro, federal agents testified that they were aware of Pierro's prior conviction for a narcotics offense some 20 years prior to that date.

Observations at the Plaza Diner

At the Plaza Diner in Fort Lee, New Jersey, the agents observed Christophe, whom they then thought to be Malizia, engage the defendant Panica in conversation. According to Agent Harrington, the agents knew that Panica had previously been convicted of a narcotics offense and that he was "well documented" in his agency's files as a narcotics violater. (A 69-70)

The chase

Believing that the Cadillac was being driven by Joseph Malizia and suspecting that a narcotics transaction had just occurred, the federal agents attempted to stop the Cadillac after it had entered the FDR Drive. It should be remembered that the acknowledged purpose of the agents at this point was not only to determine whether the driver was Malizia but to search the car. (A 336-339) After the chase and abandonment of the car by the defendants, the agent testified to an apparently false exculpatory statement furnished by the defendant Panica. It should here be noted, however, that the search of the Cadillac was conducted prior to the time that Harrington could report that statement to his brother agents who actually searched the car.

The above stated factors, the Circuit Court of Appeals held, provided probable cause to believe that the fruits or means of a crime were contained in the Cadillac. As the keys to the trunk of the Cadillac were obtained from Christophe, the agents well knew that the driver was not Malizia prior to the time that they opened the trunk. Petitioner respectfully submits, therefore, that the facts presented constitute nothing more than mere suspicion that criminal activity had taken place. It is well settled that mere suspicion will never suffice as probable cause. *Henry* v. *United States*, 361 U.S. 98 (1959). The situation contained in the case at bar is a series of events which, when subjected to a law enforcement officer's interpretation, equal the vaguest type of suspicion. First, the "tip" alone may not be considered in determining probable cause because of the conceded unreliability of the source and the failure of the agents to independently corroborate the information prior to the actual search. *Aguilar* v. *State of Texas*, 378 U.S.

108 (1964). Further, the prior criminal activity of the defendants, totally unrelated to the events observed by the agents, cannot, it is respectfully submitted, transform what appears to be entirely innocent activity into probable cause that a crime was being committed. The fact that Panica was "well documented" in the Bureau's files was without reference to a source, credible or otherwise, which would remove the possibility that the documentation resulted from casual rumor or suspicion.

The coincidence that Christophe was said to resemble the fugitive Malizia similarly cannot justify the police activity with regard to the Cadillac. To deprive a citizen of Constitutional immunity from unreasonable search and seizure simply because he resembles another person would be intolerable. See for example: *United States* v. *Di Re*, 332 U.S. 581 (1948); *United States* v. *Collins*, 439 F.2d 610 (D.C. Cir., 1971).

The only other factor which the Government submits is its effort to establish probable cause is the flight of the defendants Panica and Christophe. However, this Court has held in *Wong Sun* v. *United States* (*Supra*) that vague suspicion could not be transformed into probable cause by flight which the arresting officers themselves provoked. 371 U.S. at page 484.

It is conceded by Petitioner that the warrant requirement applicable to a search of a building or residence does not have equal force where automobiles are involved. *Carroll* v. *United States*, 267 U.S. 132 (1925); *Chambers* v. *Maroney*, 399 U.S. 42 (1970). Nevertheless, the basic requisite that probable cause must exist to conduct a warrantless automobile search remains. For these reasons, in

view of the facts here developed, it is respectfully submitted that the requisite probable cause was not present.

The Petitioner, Albert Pierro, adopts and urges each of the points which may be asserted by his co-appellants in the United States Court of Appeals in their petition to this Court for a writ of certiorari.

CONCLUSION

For these reasons a Writ of Certiorari should issue to review the Judgment and Opinion of the Court of Appeals for the Second Circuit.

Respectfully submitted,

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Dated: January 12th, 1973

APPENDIX

Opinion and Judgment of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 251, 268, 274—September Term, 1972.

(Argued October 31, 1972 Decided December 14, 1972.)

Docket Nos. 72-1807; 72-1866-67

UNITED STATES OF AMERICA,

Appellee,

—v.—

NICHOLAS CHRISTOPHE, VICTOR PANICA and ALBERT PIERRO,

Defendants-Appellants.

Before:

LUMBARD, FEINBERG and OAKES,

Circuit Judges.

Appeals from judgments of conviction entered in the United States District Court for the Southern District of New York, Lee P. Gagliardi, *J.*, after a jury trial of one defendant and a non-jury trial of the other two defendants, for violation of §§ 21 U.S.C. 812, 841(a)(1) and 841(b)(1)(A) and conspiracy to violate these sections.

Convictions affirmed.

WALTER J. HIGGINS, JR., Assistant United States Attorney (Whitney North Seymour, Jr., United States Attorney for the Southern District of New York, and Peter F. Rient, Assistant United States Attorney, on the brief) *for Appellee.*

JOHN L. POLLOK, New York, N.Y. (Lenefsky Gallina Mass Berne & Hoffman and Jeffrey C. Hoffman, on the brief), *for Appellant Nicholas Christophe.*

JAMES M. LAROSSA, New York, N.Y. (Gerald L. Shargel, on the brief), *for Appellant Albert Pierro.*

JAY GOLDBERG, New York, N.Y. (Gretchen White Oberman, on the brief), *for Appellant Victor Panica.*

LUMBARD, *Circuit Judge:*

Nicholas Christophe, Victor Panica, and Albert Pierro appeal from judgments of conviction entered against them on June 20, 1972, in the Southern District of New York. They were prosecuted under a two count indictment alleging (1) possession, with the intent to distribute, of a narcotic drug, in violation of 21 U.S.C. §§ 812, 841(a)(1) and 841(b)(1)(A), and (2) conspiracy to violate these sections. Panica was found guilty after a four day jury trial, commencing April 26, 1972, at which Judge Gagliardi presided.[1] On May 25, 1972, Christophe and Pierro, whose

[1] A fourth defendant, Frank DeSimone, was also indicted. He was tried with Panica and at the close of the government's case his motion for a judgment of acquittal was granted.

trial had been severed from Panica's, were convicted following a non-jury trial before Judge Gagliardi. Panica and Pierro were sentenced to 20 years imprisonment on each count, the sentences to run concurrently, and to six years of special parole commencing immediately thereafter. Christophe received concurrent terms of imprisonment of seven and one half years on each count and a three year term of special probation. We affirm the convictions.

I. The Government's Case[2]

In late December, 1971, agents of the Federal Bureau of Narcotics and Dangerous Drugs received information from a "close friend" of the Pierro family that defendant Albert Pierro, a convicted narcotics offender, and Joe "Patsy" Malizia, a fugitive under indictment for a federal narcotics violation, were partners in the narcotics trade, and that by watching Albert Pierro they could locate "Patsy" Malizia. Soon after, the Pierro house in Palisades Park, New Jersey, was placed under surveillance by the Bureau. At about 10:15 P.M. on the night of January 26, 1972, Agents Harrington and Grant, from a vantage point about 50 yards south of the Pierro residence, observed Frank DeSimone and Albert Pierro leave the house. DeSimone got into his car and drove away, while Pierro returned to the house. Approximately 15 minutes later, a 1970 brown Cadillac Eldorado drove up the street and stopped in the middle of the road opposite the Pierro

[2] This recital of the government's case is taken from the facts as developed at the suppression hearing, in which all three appellants participated. At the trial of Christophe and Pierro, the facts were stipulated to be the same as those presented at the suppression hearing; the government's case at Panica's trial was also substantially the same.

house. Someone drew back the curtain from a second story window and waved, and then the car parked. Pierro came out, and he and the driver carried inside a number of bundles from the car's trunk. The driver matched the fugitive's general description, and the agents thought at the time that he might be Malizia. However, it later developed that the driver was the defendant Christophe.

At about 11:00 P.M., Pierro left the house again, this time carrying a large blue valise. He looked up and down the street and then, accompanied by Christophe, placed the blue valise in the trunk of the Cadillac. Pierro returned to the house, and Christophe drove off.

The agents, still thinking Christophe was Malizia, followed the Cadillac to the parking lot of the Plaza Diner in Fort Lee, New Jersey. Frank DeSimone and defendant Victor Panica were in the parking lot, and they immediately went over to Christophe. The agents recognized Panica as a previously convicted narcotics violator. After a few minutes of conversation, Christophe got back into the Cadillac and Panica joined him on the passenger side. DeSimone went to his car and both vehicles left the diner.

The agents chose to continue their surveillance of the Cadillac. They followed the vehicle across the George Washington Bridge into Manhattan, down the Harlem River Drive and onto the F.D.R. Drive. As the cars neared the 116th Street exit of the F.D.R. Drive, the agents attempted to stop the Cadillac to determine whether the driver was in fact the fugitive Malizia and to investigate the activities they had observed earlier. They put a flashing red light on the dashboard of their unmarked car, flashed their headlights, and sounded the horn—all to no avail. The Cadillac

kept right on going, exiting F.D.R. Drive at 116th Street, then racing north along First Avenue at speeds up to 70 miles per hour and running several red lights.

With the agents close behind, Christophe drove across the Willis Avenue Bridge into the Bronx, then doubled back along Bruckner Boulevard toward the Willis Avenue Bridge again. Under the bridge the car came to a sudden stop. Christophe and Panica jumped out, leaving the doors open and the engine running. Agent Harrington, yelling "Federal Agents, Stop," pursued Christophe up the street and around a corner, where Christophe was finally apprehended by a New York City policeman—one of a number who had joined in the chase. Harrington brought Christophe back to the abandoned Cadillac, where Agent Grant searched him and took from him the key to the Cadillac's trunk. Agent Harrington, taking another New York City patrolman with him, went into the bar nearby into which he had seen Panica flee. Harrington went up to Panica and asked him to step outside. Panica protested "I've been here an hour and a half," but eventually agreed to go with Harrington. By the time they had returned to the abandoned Cadillac, its trunk had already been opened revealing a large blue valise containing 39.8 pounds of heroin and a small white bag containing $150,000 in cash. Both Christophe and Panica were then formally placed under arrest.

At approximately 2:00 A.M. on the morning of January 27 a group of federal agents went to Palisades Park, New Jersey and arrested Albert Pierro. The agents seated Mr. and Mrs. Pierro in the living room of their house and then conducted a cursory examination of the premises to

make sure that no other adults were present. By 5:00 A.M. a search warrant had been obtained and the agents began a thorough search. In the garage they found approximately 39 pounds of heroin hidden in a cardboard Taitanger Champagne box.

II. The Search of the Cadillac

All three defendants contend that Judge Gagliardi erroneously denied their motion to suppress the heroin discovered in the warrantless search of the Cadillac automobile in which Christophe and Panica were riding. Because of the ease with which an automobile can be moved from one jurisdiction to another, law enforcement officials have long been permitted to search, without a warrant, an automobile stopped or abandoned on the highway when they have probable cause to believe that it contains contraband. See *Carroll* v. *United States*, 267 U.S. 132, 153, 155-56 (1925); *Chambers* v. *Maroney*, 399 U.S. 42 (1970); *United States* v. *Carneglia*, slip op. 219 (2d Cir. October 30, 1972). *Cf. Coolidge* v. *New Hampshire*, 403 U.S. 443, 458-64 (1971). We agree with Judge Gagliardi that the federal agents had probable cause in this case to search the Cadillac. They had received information that Albert Pierro, a previous narcotics violator, was currently engaged in the narcotics trade. On the night of January 26 Agents Harrington and Grant observed suspicious activity at the Pierro residence. The Cadillac driven by Christophe approached the house in a cautious fashion and parked only after receiving a signal from someone inside the house. One half hour later Pierro was seen transferring, in a furtive manner, a large blue valise from the house to the car. The

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agents followed the car to a meeting at the Plaza Diner between Panica (who had a prior narcotics conviction), DeSimone (who had left the Pierro house just before the Cadillac arrived), and Christophe (who the agents still thought to be Malizia). When the agents later attempted to halt the automobile, Christophe drove at high speed through East Harlem and into the Bronx. The car finally stopped under the Willis Avenue Bridge, and Christophe and Panica, ignoring calls to stop by Agent Harrington, tried to escape on foot but were quickly apprehended. The information possessed by the agents, when combined with the furtive activity at the Pierro house, the meeting at the diner, the high speed chase and the attempted flight constituted probable cause to search the Cadillac.[3]

Since Christophe's sole ground of appeal is the alleged illegality of the search of the Cadillac, we affirm his conviction.

Our holding that there was probable cause for the search also disposes of Pierro's claim that the warrant to search his home was illegal because it was based in part on information secured during the search of the Cadillac. In upholding the search, we also uphold the warrant.

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[3] Christophe and Panica also argue that the search was invalid because nothing prevented the agents from immobilizing the Cadillac and then obtaining a warrant before conducting the search. The Supreme Court dealt with this argument, contrary to Panica's contentions, in *Chambers* v. *Maroney*, 399 U.S. 42, 51-52 (1970). *Coolidge* v. *New Hampshire*, 403 U.S. 443 (1971), which involved police "entering private property to seize and search an unoccupied, parked vehicle not then being used for any illegal purpose," 403 U.S. at 463 n. 20, lends no support to defendants' contentions. See *United States* v. *Carneglia*, slip op. 219, 226-28 (2d Cir., October 30, 1972).

III. The Search of Pierro's House

Pierro makes an additional claim that his house was illegally searched at 2:00 A.M., a full three hours before a warrant was obtained. In support of his motion to suppress the heroin discovered in his garage, Pierro called 14 Special Agents of the Federal Bureau of Narcotics and Dangerous Drugs. Nevertheless, the evidence developed at the suppression hearing made it abundantly clear that when the agents first walked through the Pierro house at 2:00 A.M., they were simply securing the premises after arresting Pierro. They were entitled to conduct a cursory examination of the premises to see if anyone else was present who might threaten their safety or destroy evidence. Moreover, the heroin was not discovered until a full scale search had been conducted after the warrant was obtained several hours later.

IV. Evidence of Panica's Membership in the Conspiracy and Possession of Drugs

Defendant Panica asserts that the trial court erred in denying his motion for a judgment of acquittal on both the conspiracy and the substantive counts. Panica's defense at the trial consisted of the testimony of two witnesses, Daniel Capano and Edward Sableski. The substance of their testimony was that they met Panica on the night in question in a New York restaurant and together returned to New Jersey to play cards. Instead, they drank at Russells Tavern and at 9:30 went to the Plaza Diner to have something to eat before going to a place where Panica could get a taxi back to New York. Sometime after 10:00 P.M. the three left the diner.

Considering all the evidence in the light most favorable to the government, *Glasser* v. *United States*, 315 U.S. 60,

80 (1942), we think that there was enough evidence from which the jury could infer beyond a reasonable doubt that Panica was conspiring with Christophe and Pierro to possess and distribute narcotics in violation of 18 U.S.C. §§ 812, 841(a)(1) and 841(b)(1)(A). After transferring the heroin from Pierro's house to Christophe's car, Christophe drove directly to the Plaza Diner where he met Panica and DeSimone. Following a short discussion, Panica got into the Cadillac containing the heroin and $150,000 in cash and drove off with Christophe. When the car halted after a high speed chase by federal agents, Panica fled on foot. When he was confronted immediately thereafter by Agent Harrington in the bar, Panica made a false exculpatory statement that he had been there for an hour and a half, which covered the time from when the narcotics were first placed in the car through the period of the police chase. Taken together these facts provided enough evidence from which a jury could find that he knew what was going on and that by his presence he was attempting to assist in the success of the operation and, therefore, that he was a member of the conspiracy. *Cf. United States* v. *Geaney*, 417 F.2d 1116, 1121 (2d Cir. 1969), cert. denied, 397 U.S. 1028 (1970). Any possible doubt of Panica's complicity was completely dispelled by his flight from the Cadillac, his attempt to hide and his false statement to Agent Harrington about his presence in the bar.

Panica also challenges his conviction on the substantive charge of possessing narcotics with the intent to distribute them. The basis of his claim is that there was insufficient evidence to prove that he was in possession of the narcotics discovered in the trunk of the Cadillac. Since we hold that there was adequate evidence to find that Panica

was a conspirator, his conviction on the substantive count must also be upheld. He was riding in the automobile which was carrying heroin pursuant to a plan in which the jury could find he knowingly participated. From these facts the jury could infer that Panica had equal access to and control of the heroin in the trunk and thus was in constructive possession. *Cf. United States* v. *Massarotti*, 462 F.2d 1328 (2d Cir.), cert. denied, 41 U.S.L.W. 3247 (1972).

Panica's other contentions can be briefly disposed of. He claims that Judge Gagliardi improperly instructed the jury on the issue of flight, but we find no objection to the court's charge.[4] His other claim concerns Judge Gagliardi's refusal to suppress the use of Panica's 1960 narcotics conviction for impeachment purposes, thus allegedly keeping Panica from testifying at the trial. The use of a 12 year old conviction, where the defendant was not released from prison until 8 years prior to trial, comes well within the limits of the trial judge's discretion to bar or permit such evidence. See *United States* v. *Puco*, 453 F.2d 539 (2d Cir. 1971); Proposed Federal Rules of Evidence 609(b) (approved by the Supreme Court, November 20, 1972, for transmission to the Congress, to take effect July 1, 1973).

We affirm the convictions.

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[4] The trial court instructed the jury as follows:

> Now, you may take into acccount whether or not there has been flight or concealment by the defendant after a crime has been committed. This does not create a presumption of guilt. If you find that there was flight by the defendant, you may consider it as tending to prove the defendant's consciousness of guilt.
>
> However, you are not required to do so. You should consider and weigh any evidence of flight or concealment by the defendant in connection with all other evidence in the case and give it such weight as you in your judgment decide it is entitled to receive.

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-981

ALBERT PIERRO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury-waived trial in the United States District Court for the Southern District of New York, petitioner and a co-defendant, Christophe, were convicted of having possessed nearly forty pounds of heroin with intent to distribute, and conspiracy to commit that offense, in violation of 21 U.S.C. 841(a)(1) and 846. Petitioner was sentenced to concurrent prison terms of twenty years. The court of appeals affirmed (Pet. App. 1a-10a).

Petitioner's sole contention in this Court is that the federal agents did not have probable cause to search the

Cadillac car (resulting in the seizure of the contraband heroin) that his co-defendants abandoned after being pursued at high speed by the agents, and that the subsequent search of his house pursuant to a warrant was tainted.[1] The evidence bearing on this claim is fully set forth in the opinion of the court below, which correctly held that the agents did have probable cause and that the seizures were therefore lawful (Pet. App. 3a-7a). We rely upon that opinion.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

FEBRUARY 1973.

[1] Petitioner's trial followed the jury trial conviction of another co-defendant, Panica. Although petitioner was not in the car during the chase or when it was searched, we shall assume *arguendo* that he had standing to challenge the seizure of the contraband which he claims was his.

☆ U.S. Government Printing Office: 1973—495-565/537